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Public Prosecutor v Raymond ak Patrick

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HIGH COURT (KUCHING) — CRIMINAL TRIAL NO KCH-45A-2/7 OF 2014
RHODZARIAH BUJANG J
10 SEPTEMBER 2015

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Criminal Law — Dangerous drugs — Trafficking — Whether accused had exclusive possession of drugs seized — Whether accused had control over or power of disposal over drugs — Whether possession in law proven — Whether upon maximum evaluation of prosecution's evidence prima facie case had been made out against accused — Possession — Whether there was sufficient evidence to link accused to drugs

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Evidence — Prima facie case — Establishing of — Evaluation of evidence — Whether upon maximum evaluation of prosecution's evidence prima facie case had been made out against accused — Whether prosecution evidence capable of two or more inferences — Whether inference more favourable to accused should be adopted

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Acting upon information received of a Satria Neo car ('the car') being involved in drug trafficking activities, Insp Irwan and Sergeant Razali, accompanied by eight other police personnel, carried out a raid of the accused's family house ('the house'). When the raiding party arrived at the house the car was parked at the car porch of the house but there was no one at home. The raiding team then took up various positions around the vicinity of the house, while the Inspector waited outside the house. After about half an hour of waiting, the accused returned home in a car that drove off after dropping him at home. After the accused had entered the house, the Inspector approached the accused and introduced himself before asking the accused to open the door of the house. Upon entering the house, the Inspector had administered the caution under s 39B(1)(b) of the Dangerous Drugs Act 1952 ('the Act') to the accused before questioning him as to whether he kept any drugs in the house. The accused had then led the police team to another room in the house from which he produced a container that was found to contain dried leaves which upon analysis by a government chemist was confirmed to be 372.10g of cannabis. In addition, the police also seized a half of a cigarette stick of dried leaves, which was confirmed by the same chemist to be 0.10g of cannabis. The accused was arrested and charged with trafficking in the 372.10g of cannabis (the first charge) and being in possession of the 0.10g of cannabis (the second charge). In his defence, the accused claimed that the drugs did not belong to him but to an individual

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named Taitues Tonio Ango Michael (PW9), who was also the owner of the car. PW9 was also arrested a few hours after the accused, at a pub called the Ruai. In his defence the accused sought to adduce evidence of accessibility of the house to others, particularly PW9, to support the fact that he did not have exclusive possession of the drugs found in the house.

Held, discharging and acquitting the accused of both charges without his defence being called:

(1) There was sufficient evidence in the form of photographs tendered as defence exhibits, PW9's criminal background and the admission by Insp Irwan about their targeted suspect using the Satria Neo car that PW9 was the main culprit in this case and that the accused's house was used as his base for the illegal peddling of drugs. Further, the traces of fingerprint lifted from the container in which the 372.10g of cannabis was found and one of the smoking apparatus were not found to be that of the accused as they were insufficient for comparison. Therefore, even though exclusive possession need not be proved to sustain a charge under s 39B and the accused had custody of the drugs since it was in his house, there were grave doubts as to whether he had control over or the power of disposal over them. The power of disposal was one of the elements to mens rea possession and thus necessary to establish possession in law (see paras 18–19).

(2) Even if PW9 was not the main culprit, there was no prima facie case against the accused in respect of the first charge of trafficking. The evidence adduced by the prosecution was capable of two inferences, namely that it was the accused who was in possession of the drugs and given their quantity he was presumed to be trafficking in them and the other inference was that it was PW9 who was in possession of the same but who was, despite the presence of the Satria Neo car in the house, fortunate enough to be in another place that night. The second inference would seem plausible in the light of the fact that the raiding team had proceeded to the Ruai to arrest PW9. There would be no reason for this arrest if the police were not convinced that PW9 was the culprit identified through the use of the car in the information given to them on the drug trafficking activities. In any case, it was a trite principle of criminal law that when evidence was capable of two or more inferences and one favoured the accused, that the latter inference would be adopted. Thus upon a maximum evaluation of the prosecution's evidence, a prima facie case had not been made out against the accused in respect of the first charge (see paras 20–21).

(3) As for the second charge of possession of the 0.10g of cannabis, the cigarette butt was found in an open space in the house and no fingerprint of the accused was found on it. Further, that cigarette butt was not sent

for DNA profiling. This consideration together with PW9's involvement as well as the absence of any definitive evidence linking the accused to that cigarette butt other than the fact that the house belonged to the accused would lead to the equal probability that it was PW9 who smoked that cigarette. Thus, there was no evidence against the accused in respect of the second charge also (see para 21).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima bahawa sebuah kereta Satria Neo ('kereta tersebut') terlibat dalam aktiviti pengedaran dadah, Insp Irwan dan Sarjan Razali, berserta lapan pegawai polis lain, menjalankan serbuan atas rumah tertuduh ('rumah tersebut'). Apabila pasukan serbuan tiba di rumah tersebut, kereta diletakkan dia tempat letak kereta rumah tersebut tetapi tiada siapa di rumah. Pasukan serbuan mengambil pelbagai posisi dalam kawasan rumah tersebut sementara Inspektor pula menunggu di luar rumah. Selepas kira-kira sejam menunggu, tertuduh pulang ke rumah dengan sebuah kereta yang kemudiannya berlalu pergi selepas menghantarnya di rumah tersebut. Selepas tertuduh memasuki rumah tersebut, Inspektor mendekati tertuduh dan memperkenalkan dirinya sebelum menyuruh tertuduh membuka pintu rumah. Selepas memasuki rumah, Inspektor memberikan amaran di bawah s 39B(1)(b) Akta Dadah Berbahaya 1952 ('Akta') kepada tertuduh sebelum menyoalnya sama ada dia menyimpan apa-apa dadah dalam rumah tersebut. Tertuduh kemudiannya membawa pasukan polis ke sebuah bilik lain di dalam rumah di mana dia mengeluarkan sebuah bekas yang didapati mengandungi daun-daun kering selepas dianalisa oleh ahli kimia kerajaan, disahkan sebagai 372.10g kanabis. Seterusnya, pihak polis juga merampas setengah puntung rokok daun kering, yang disahkan oleh ahli kimia yang sama sebagai 0.10g kanabis. Tertuduh ditahan dan dipertuduh mengedar 372.10g kanabis ('pertuduhan pertama') dan memiliki 0.10g kanabis ('pertuduhan kedua'). Dalam pembelaannya, tertuduh mendakwa bahawa kesemua dadah tersebut bukan miliknya tetapi milik seorang individu bernama Taitues Tonio Ango Michael ('PW9'), yang juga pemilik kereta. PW9 turut ditahan beberapa jam selepas tertuduh di tahan, di sebuah pub yang dikenali sebagai Ruai. Dalam pembelaannya, tertuduh memohon untuk mengemukakan keterangan akses rumah oleh orang lain, khasnya PW9, untuk menyokong fakta bahawa dia tidak mempunyai milikan eksklusif terhadap dadah-dadah yang dijumpai dalam rumah.

Diputuskan, melepaskan dan membebaskan tertuduh daripada kedua-dua pertuduhan tanpa memanggilnya membela diri:

(1) Terdapat keterangan yang cukup dalam bentuk gambar yang dikemukakan sebagai ekshibit pembelaan, latar belakang jenayah PW9 dan pengakuan oleh Insp Irwan bahawa suspek yang disyaki menggunakan kereta Satria Neo bahawa PW9 merupakan dalang utama

dalam kes ini dan bahawa rumah tertuduh digunakan sebagai pangkalan pengedaran dadah. Seterusnya, cap jari yang diambil pada bekas dalam mana 372.10g kanabis dijumpai dan perkakas merokok didapati bukan milik tertuduh kerana tidak cukup untuk dibuat perbandingan. Oleh itu, walaupun milikan eksklusif tidak perlu dibuktikan untuk mengekalkan satu pertuduhan di bawah s 39B dan tertuduh mempunyai jagaan atas dadah kerana berada di dalam rumahnya, terdapat keraguan nyata sama ada dia mempunyai kawalan atau kuasa melupuskan ke atas kesemuanya. Kuasa melupuskan adalah salah satu elemen milikan mens rea dan dengan itu, perlu untuk membuktikan milikan di bawah undang-undang (lihat perenggan 18–19).

(2) Jika pun PW9 bukan dalang utama, tiada kes prima facie terhadap tertuduh berkenaan pertuduhan berkenaan pertuduhan pengedaran pertama. Keterangan yang dikemukakan oleh pihak pendakwaan bermaksud ada dua kesimpulan, khususnya bahawa tertuduh yang memiliki dadah dan melihat pada kuantiti, dia dianggap mengedarnya dan kesimpulan satu lagi adalah PW9 yang memilikinya tetapi dia, walaupun ada kereta Satria Neo dalam rumah, bernasib baik kerana berada di tempat lain pada malam itu. Inferens kedua lebih berkemungkinan melihat pada fakta bahawa pasukan serbuan terus ke Ruai untuk menahan PW9. Tidak ada alasan bagi penahanan ini sekiranya polis tidak yakin bahawa PW9 adalah dalang yang dikenal pasti melalui penggunaan kereta dalam maklumat yang diberikan kepada mereka tentang aktiviti pengedaran dadah. Dalam apa jua kes, menjadi prinsip matan undang-undang jenayah bahawa apabila keterangan boleh membawa kepada dua atau lebih inferens dan satu berpihak pada tertuduh, inferens kedua akan diguna pakai. Oleh itu, atas penilaian maksimum keterangan pihak pendakwaan, kes prima facie tidak dibuktikan terhadap tertuduh bagi pertuduhan pertama (lihat perenggan 20–21).

(3) Bagi pertuduhan kedua milikan 0.10g kanabis, puntung rokok dijumpai dalam ruang terbuka di dalam rumah dan cap jari tertuduh tidak dijumpai padanya. Seterusnya, puntung rokok tersebut tidak dihantar bagi pemprofilan DNA. Pertimbangan ini berserta dengan penglibatan PW9 dan juga ketiadaan keterangan definitif yang mengaitkan tertuduh dengan puntung rokok tersebut melainkan fakta bahawa rumah itu milik tertuduh, membawa kepada kemungkinan seimbang bahawa PW9 yang merokok. Oleh itu, tiada keterangan terhadap tertuduh bagi pertuduhan kedua juga (lihat perenggan 21).]

Notes

For cases on establishing of, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2733–2735.

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)
Chan King Yu v PP [2006] 6 MLJ 128; [2006] 3 CLJ 853, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28; [1955] 1 LNS 53 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Nagalingam a/l P Vellupillay v PP [2015] 3 MLJ 92; [2015] 1 CLJ 1086, CA (folld)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)
Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Zaifull bin Muhammad v Public Prosecutor and another appeal [2013] 2 MLJ 348, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(b)

Mirza bt Mohamad (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.
Osman Ibrahim (Roger Chin with him) (Osman Ibrahim & Co) for the accused.

Rhodzariah Bujang J:

[1] The accused is a young man, only twenty one years of age at the time of the alleged commission of the offence and the son of a policeman. He lived alone in their family house at No 171, Lorong 2AIC, Muara Tabuan, Fasa II, 93350, Kuching where and when he was alleged on 28 March 2014 to be trafficking in 372.10g of cannabis as well as being in possession of 0.10g of the same dangerous drug. His father and other members of his family lived in Sarikei following his father's posting there in 2005. As the evidence in his trial of the two charges unfolded, the accused being home alone as did the physical location of the house assumes great significance to his claim of innocence to the charges, particularly that of drug trafficking made against him, prompting me to lay out in detail the house address above. What I am about to describe of its location is gleaned from court's visit to the scene on 15 June 2015.

THE HOUSE

[2] The accused's house is in a housing estate and is the last single storey terraced one on the lane, Lorong 2AIC but it is conjoined to another house

which faces the main road. The front compound of the house, which doubles as a car porch is small but enough to fit one car with just a small plot of earth beside it to resemble a garden.

[3] Although the lane ends at the accused's house, ie it is a dead end, there is a concrete pathway linking that lane to the main road. There is also a big concrete monsoon drain alongside the said road. Opposite that conjoined house is another house with high concrete fence which partially blocked the view of the main road if one were to stand at the end of the lane. It is at this concrete pathway and subsequently in the monsoon drain that one of the raiding officers, one Sergeant Razali bin Osman (PW11) said he was during the operation to nab the alleged drug trafficker based on information received by the police. I had to make a specific mention of not just the physical location of the accused's house but also his hiding place because of the issues raised in the cross-examination of this witness and that of Insp Irwan Iskandar bin Md Yasin ('PW6') by the two counsel for the accused, Mr Osman Ibrahim and Mr Roger Chin. Hereinafter I will mention the witnesses by their official rank and/or first name.

THE INFORMATION

[4] Both Insp Irwan and Sergeant Razali testified that the information which the police received was that the car used by the alleged trafficker is a Satria Neo with registration number QAK 1546 and if that car was found parked at the address of the accused's house, then that trafficker would be there and the drugs would probably be in the house. The said car was indeed parked at the car porch of the accused's house when the raid was conducted that night. However, the car, it was not disputed, was not that of the accused nor used by him. It belonged to the brother-in-law of a friend of the accused named Taitues Tonio Ango Micheal (PW9), who was also arrested a few hours after the accused, at a pub called Ruai but was not charged with any offence arising out of the raid in the house. Photograph of the car uploaded online on Taitues's Instagram account was tendered as exh D4(d) by the defence.

THE RAID

[5] Inspector Irwan testified that besides him and Sergeant Razali, eight other police personnels accompanied him to the raid. Upon arrival at the accused's house at about 11.30pm on 27 March 2014, the police party broke up into groups – Inspector Masitah and Corp Hamid went to the back of the house whilst Sergeant Razali, Corp Raimol, Corp Colin and L/Corp Shahidan waited outside and the rest were tasked to drive away the police vehicles used by them to enter the lane leading to the accused's house. Inspector Irwan said upon arrival at the house, they entered the compound of the house, looked through the glass window and knocked on the door but received no response.

He decided to just wait outside the house by himself and dispersed the rest of the raiding team to take up their positions as stated earlier.

[6] After about half an hour of waiting he saw a car arrived and stopped in front of the accused's house. A male, later identified as the accused alighted from the car before the car was driven off. The accused walked by the side of the Satria Neo car parked at the car porch but because he was standing at the other side of the car, he could not see what the accused was doing. After two to three minutes, he said he approached the accused and said 'Oi Polis'. The accused, he said was shocked and appeared as if he wanted to run away. He again said 'polis, polis'. He was then joined by Sergeant Razali and Insp Irwan proceeded to introduce himself before asking the accused to open the door of the house. This the accused did with one of the keys in a set which he had with him. The set of keys was tendered as exh 37 at the trial. Upon entering the house, Insp Irwan said he administered the caution under s 39B(1)(b) of the Dangerous Drugs Act 1952 to the accused and called Insp Masitah and Corp Hamid to come into the house. When they were all there he proceeded to ask the accused if he kept any drugs in the house and after at first keeping quiet, the accused answered yes when he repeated the question. Thereafter, the accused led him to what was termed in the trial as the second room in the house which according to the undisputed evidence is the bedroom of the accused's sister named Regina. Once inside the bedroom, the accused opened a wardrobe with a sliding door and from inside it took a square plastic container with a red cover and showed it to the Inspector. Inspector Irwan said when it was inside the cupboard, a t-shirt brand Burbery (marked E-15 by the investigating officer) was on top of the container. Inspector Irwan asked the accused to bring the container to the dining table. Photograph of the wardrobe is tendered as exh P3 (F).

[7] Inspector Irwan then proceeded to open the container and found inside it one aluminium foil containing dried leaves and eight plastic packets also containing dried leaves which upon analysis by the chemist, Puan Rami Gendang (PW2) was found to be cannabis, or 'weed' as its common parlance goes. Photographs of the container and its content as described above was tendered as exhs P4(1) to (6). Inspector Irwan seized the exhibits as he did a glass plate on the dining table containing half of a cigarette stick also with dried leaves inside it which was later confirmed by the same chemist to be cannabis. Two utensils (as shown in photographs exh P4 (20 and 21)) suspected to be used for drug inhalation on the same table were also seized by him. When asked by Insp Irwan who the exhibits belonged to, the accused said 'Tai'. That was the nickname of Taitues established at the trial.

[8] The accused was then brought to the Ruai where at the back entrance Taitues was arrested after the accused identified him to the officers. From a body search of Taitues, Insp Irwan found an Erimin 5 tablet and a small packet

also suspected to be ganja. A police report made by Insp Irwan on the arrest and seizure of the exhibits and in which it was mentioned that the accused's urine sample tested positive for THC was tendered and marked as exh P33. This I did despite the objection raised by his defence counsels that the mention of the positive result for the urine sample is prejudicial to the accused. I ruled that the said fact as disclosed is relevant given that the accused was charged for drug trafficking, not some unrelated offence. A seizure list of the exhibits were tendered and marked as exh P35, also despite the objection of the counsels who were riled up by Insp Irwan stating in the list that the container was taken by the accused from the said room ('diambil oleh subject dari pakaian bilik kedua sebelah kiri rumah') and because the accused did not sign at the back page of the list. Apart from the drug or drug related exhibits, a few articles of clothings, a pair of boxers, a pair of shorts, two pairs of jeans and four shirts, one of which is the Burbery t-shirt mentioned earlier were seized from the house. They were all sent for DNA analysis and according to the chemist, Puan Zaliha bt Suadi (PW3) one shirt marked E26 and one pair of jeans marked E27 have Taitues's DNA profile whereas the rest of the clothings, (except for the t-shirt marked E25) all had the accused's DNA as the major and/or contributor. In the Burbery t-shirt marked 'E15' she said Taitues's DNA cannot be excluded but for the others (except the ones mentioned above), yes.

[9] Given that there was a common version of what the defence contended happened at the raid and which they raised in the cross-examination of Insp Irwan and Sergeant Razali, I have decided to lay out next the evidence of the said sergeant.

[10] Sergeant Razali testified and in fact showed to us during the court visit to the scene that he was hiding at the concrete pathway upon their arrival there when Insp Irwan took up his position at the said car porch or compound. Whilst he was at that concrete pathway, he saw the light of a car approaching the house on the said lane so he hid himself in the monsoon drain. He saw a male person alighted from the car before the car left. Both Insp Irwan and Sergeant Razali were not able to identify the make or registration number of the said car. Sergeant Razali confirmed the reaction of the accused when he was apprehended by Insp Irwan and also confirmed that caution was administered to the accused but he said it was done outside the house. When that Insp Irwan asked the accused whether he kept anything against the law in the house, the accused's answer was a yes, he further said. Sergeant Razali also confirmed the subsequent discovery and seizure of the container and its content as well as the other exhibits on the dining table. The other difference in their evidence is that Insp Irwan said he opened the container and found the drug exhibits (p 144 of notes of proceedings, lines 5 to 7) whereas Sergeant Razali said the accused opened the container and took out the drug exhibits (p 343 of the notes of

proceedings lines 22 to 24). The contradictions in their evidence however are not material when seen in the light of the other evidence and considerations I will make later.

THE CROSS-EXAMINATION

[11] Both the above police personnels were asked but denied that when the police raiding party arrived at the scene, their arrivals were witnessed by the accused's neighbor opposite his house, who was identified by the defence counsel by both his name, ie Awang Mohamad Ismail and a National Registration Identity Card number, 891222–13–5771 and who, according to the defence saw the police breaking into the accused's house, before the accused arrived. That, according to the cross-examination of the said witnesses was why the police was called and in response thereto, a patrol unit came to the scene. Both Insp Irwan and Sergeant Razali admitted that an MPV patrol car did come to the accused's house but after the raid was completed and was met by Insp Irwan who informed them of the raid and the patrol car left. To counter the evidence, the learned deputy public prosecutor called as the prosecution's last witness the police personnel L/Corp Mohamad Hazrik bin Assan (PW14) who received the call from a member of the public at twelve midnight, from the control room of the MPV unit about the presence of suspicious persons at the area of Muara Tabuan. The police constable who responded to the call, Abdul Rahman bin Semawi, (PW13) also gave evidence and confirmed being told by a police officer that a raid was being conducted in the house when his patrol unit went there after being told to do so by L/Corp Mohamad Hazrik.

[12] What I can say at this stage about their evidence is that it confirmed that someone alerted the police about the activity in the house that night but given that the caller's identity was not recorded and L/Corp Mohamad Hazrik was not able to recall the caller's name, the contention of the defence about Awang Mohamad Ismail witnessing the break-in of the accused's house by the raiding team remains unsubstantiated. The 'break-in' was, for the record put to but denied by both Insp Irwan and Sergeant Razali as they did the defence case that the drugs were already discovered by the police themselves without any assistance by or information from the accused, and this before the accused arrived home after being dropped off, said the defence by his girlfriend, Joanna ak Johnical Rayong.

[13] The cross-examination of Insp Irwan and Sergeant Razali also did not elicit any evidence which moved me to discredit their testimonies in court pertaining to the discovery of the said drugs but it did highlight the fact that the Burberry t-shirt was stated in the seizure list (exh P34) to have been found, together with the other articles of clothings mentioned earlier in the sitting room and not, as said by Insp Irwan and Sergeant Razali on top of the container

containing the cannabis. However, Insp Irwan explained in his evidence that the inclusion of the said t-shirt amongst the other articles of clothings seized from the sitting room in the seizure list was a mistake. On my part, I am not minded to give too much weight to the discrepancy simply because in the report of the chemist ie exh P22, even though the DNA of the accused was found to be a major contributor, nevertheless the chemist could not rule out that Taitues also contributed to the mixed DNA profiles of the three persons found on the said Burberry t-shirt. That is also not the defining evidence to link the accused with the crime which is, pure and simple, the incriminating answer he gave to the question posed by Insp Irwan and the accused's own retrieval of the container from the wardrobe in his sister's room.

[14] The defence counsel however in their cross-examination of Insp Irwan, Sergeant Razali and the investigating officer Insp Noor Shazalina bt Ambo Ache (PW12) raised the issue of access to the house which same issue was similarly brought up by them during the testimonies of the accused's father, Patrick ak George Guleng (PW5) and that of his aunty, Dorothy Dutti Jeom (PW8). The accused's father and aunty confirmed in their evidence that Raymond's friends, particularly Taitues, frequented the house and that a spare key to the house was kept in the shoe rack outside the house. This is shown in a photograph marked as IDD2(C). Dorothy also said she also has a duplicate key to the house as she was entrusted to drop in once in a while to check on the house. Both these relatives of the accused gave evidence that Taitues was using the room where the cannabis was found. The accused's father also said the room and the wardrobe where the container was taken from was never locked (p 127, lines 9 and 14 of notes of proceedings). Indeed Insp Irwan also never mentioned that the room or the wardrobe were locked when they were there that night.

[15] It was also established in the cross-examination of the accused's father that a person can open the main door of the house from outside simply by putting his hand through the window nearest to the said door and during the court's visit to the scene this was successfully demonstrated to us. As is reasonably expected of a young man staying alone, it is not improbable that he had friends coming over or that there were parties held in the house. This was said by Taitues's girlfriend, Jara Bazillah (PW10) and also mentioned in the evidence of the accused's aunty and Taitues. Taitues and Jara admitted visiting the accused at the house but not staying there or even overnight. Both also admitted using Regina's bedroom to freshen up and to change clothings, said Jara. Jara even had a photograph of hers tendered by the defence as exh D4 (G) taken in the said bedroom on 7 February 2014. Taitues's photographs taken whilst playing video games in the sitting room, at the dining table whilst

holding in his right hand and by his own admission fine grinded 'weed' and at the backyard of the house were similarly tendered as defence exhs D4(B), D4(H) and D5, respectively.

[16] By themselves, this evidence of accessibility of the house to others and in particular Regina's bedroom to Taitues and Jara does not, as yet at this point in time of my judgment disentitle me to find that the accused has possession of the drugs found in the house for I am guided by the Court of Appeal's decision in *Nagalingam a/l P Vellupillay v Public Prosecutor* [2015] 3 MLJ 92; [2015] 1 CLJ 1086 at p 1097 that the 'fact of non-exclusive possession does not negate guilt' for it only meant that there was joint possession by the accused and another (the accused's wife, in the cited case). In coming to that statement, the Court of Appeal relied on the Federal Court's judgment in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 which in turn quoted also from *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53 and *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17. What was said by the Federal Court begs repetition here and I reproduced it below:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, – that is, 'exclusive' – that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
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> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53:
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> > … It is often said that 'possession must be exclusive'. This is ambiguous. *Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband*. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
> >
> > Custody likewise may be sole or joint and it has the same element of excluding others. *The main distinction between custody and possession is that a custodian has not the power of disposal*. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.
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> [18] Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956]

1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself – which some authorities term 'custody' or 'control' – and knowledge of the nature of the thing possessed. As to possession itself, he cited the following definition in *Stephen' Digest* (9th Ed, p 304), in which the exclusive element mentioned by Taylor J appears:

> *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.* (Emphasis added.)

[17] However, what I can gather from the defence cross-examination of the witnesses named above, it is not just anyone of the accused's friends that they are pointing their finger at but Taitues.

TAITUES

[18] He was, as the evidence unfolded and again putting it simply, not just a bad hat but bad news. He was the accused's childhood friend and neighbour for he lived in a house on the same lane as that of the accused. He, Jara and the accused all went to the same university ie UITM, Samarahan. By his own admission he was a drug addict and not only that he was charged in court for being tested positive for THC on the morning of his arrest following that of the accused. Jara agreed with the defence counsels that Taitues 'played and consumed ganja or marijuana' (see p 318, lines 1 to 3 of notes of proceedings) since their UITM days and when Jara gave evidence in the afternoon of 24 April 2015, she confirmed Mr Roger Chin's statement that at that point in time, Taitues was under preventive detention by the police for drug offences committed at a place called Chong Lin Park. According to the investigating officer, in her evidence given on 16 June 2015, Taitues was detained for sixty days and would probably be sent to Simpang Rengam after the detention period was over. Inspector Irwan in his evidence said after he arrested Taitues that night, Taitues admitted to him that he using the Satria Neo car. For the record, Taitues of course denied in his evidence that the drugs found in accused's house belonged to him or that he was staying in Regina's room. However, I have sufficient evidence, in the form of the photographs (mentioned earlier) tendered as defence exhibits, his criminal background and the admission by Insp Irwan about their targeted suspect using the Satria Neo that Taitues was the main culprit in this case and the accused house was used as his base for the illegal peddling of drugs. This was of course done with the full knowledge of the accused. This I say for the information relayed to Insp Irwan which prompted the raid and as described by me earlier fitted the consideration I just made and with the accused's answer to Insp Irwan's question after the discovery of the drugs that the accused told him the drugs belonged to Taitues. I arrive at this conclusion based also on the agreement by Insp Irwan, Sergeant

Razali and the investigating officer that when they searched the accused's room at the back portion of the house, they found no drugs. Further, the traces of fingerprints lifted by DSP Izanizam bin Salleh (PW4) from the plastic container and one of the smoking apparatus E19 were not found to be that of the accused as they were insufficient for comparison by the 'Penolong Pendaftar Penjenayah' as stated in his letter tendered as exh P31.

[19] Therefore, even though exclusive possession need not be proved to sustain a charge under s 39B and the accused had custody of the drugs since it was in his house, I have, based on the considerations above, grave doubts that he has control over or the power of disposal over them. That last element is necessary to establish possession in law as defined and quoted in *Chan Pean Leon*'s case which I had reproduced earlier and in addition I refer to Court of Appeal's decision in *Chan King Yu v Public Prosecutor* [2006] 6 MLJ 128; [2006] 3 CLJ 853 where the same requirement ie the power of disposal was said by the court as one of the elements to prove mens rea possession. I would, for the sake of clarity, reproduced the quotation by Gopal Sri Ram JCA of Yong J in *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 in relation to mens rea possession below:

> In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[20] If I were wrong to come to that definitive finding about Taitues being the main culprit, I would still ultimately arrive at the same conclusion that no prima facie case has been made out against the accused based on this other finding. Even at this stage of the proceedings and based on the same considerations above, the evidence adduced by the prosecution is capable of two inferences – one is that it was the accused who was in possession of the drugs and given their quantity (for the first charge) he is presumed to be trafficking in them and the other is that it was Taitues who was in possession of the same but who was, despite the presence of the Satria Neo car in the house, fortunate enough to be at another place that night. I am moved to make this other inference not only because of the considerations above but this very telling one – there is no reason why the raiding team would have proceeded to the Ruai to arrest him if they were not convinced that he was the culprit identified through the use of the Satria Neo's car in the information given to them on the drug trafficking activities. After all he was not in the house when the drugs were found and nowhere near them, so why bother to go after him? The fact that they did only proved that they believe the accused's answer given to Insp Irwan that the drugs belong to Taitues. It is now a trite principle in our

criminal law that when evidence is capable of two or more inferences and one favours the accused, the court would adopt that latter inference (see the Federal Court's case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[21] The ratio in this same cited case requires that I undertake a maximum evaluation of the prosecution's evidence and further held that a prima facie case is made out if the court would convict the accused on the said evidence should he choose to remain silent (see also *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321 and *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734). Applying that principle and holding the view based on the considerations above that the real trafficker is Taitues, I have to say that no such prima facie case has been made out against the accused in respect of the first charge. I also raised the same considerations to discharge and acquit the accused of the second charge given that the cigarette butt was found in an open space in the house (the dining hall) and no fingerprint of the accused was found on it as testified by DSP Izanizam. Further, that cigarette butt was also not sent for DNA profiling by the investigating officer. This consideration is in addition to Taitues's involvement described earlier as well as the absence of any definitive evidence linking the accused to that cigarette butt other than the fact that the house was also occupied by him. Therefore, it is equally probable that it was Taitues who smoked that cigarette. Thus, the accused is discharged and acquitted of both charges without his defence being called.

[22] The learned deputy public prosecutor in her written submission in reply has highlighted to me the fairly recent decision of the Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149 where again it was stressed that to establish possession in law, the accused must be so situated with the drugs found that 'he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need'. In other words, said Ahmad Hj Maarop FCJ, he 'must be so situated that he can deal with the prescribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he has animus possidendi)'. I have earlier explained why I believe that the drugs belonged to Taitues and not the accused.

[23] The learned deputy public prosecutor in her written submission also seeked to whittle down the importance of Taitues photograph with the grinded 'weeds' (exh D4(H) given that it was not taken around the time of the raid and stressed the importance that the drugs were found in the house and not in the car. With respect, the date the said photograph was taken need not be close to that of the crime in order to raise the inference that I made above. What is important is it shows that Taitues was openly 'advertising' himself with this

drug and this whilst in the accused's house. The fact that no drugs were found in the car does not obliterate the doubt (and a reasonable one at that), that Taitues was the owner of those found in the house.

[24] For the sake of completeness, I would address the other issue raised by the defence and answered by the learned deputy public prosecutor in her written submission which is the difference in the weight of the drugs weighed by Insp Irwan at his office after the raid and that found by the chemist. Inspector Irwan said in his police report (exh P32) that the weight of the cannabis in the container was 437g and that in the cigarette butt on the plate found on the dining table was 1.20g. The chemist however testified that the gross weight of the former was 422.8g and the latter, 0.3947g.

[25] The Federal Court in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636 have held that despite the unexplained difference in the weight of the drugs found by the chemist and by the police but given that there was no doubt that it was the same exhibits seized from the appellant that was examined by the chemist and for which the charge was made against him, the said difference did not raise any reasonable doubt on the prosecution's case. The other Federal Court case, *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348 where such a difference was found to be fatal against the prosecution was distinguished by the Federal Court in *Hasbala*'s case because in that earlier case there was also a doubt about the identity of the exhibits seized and subsequently analysed by the chemist in that there was discrepancy as to the number of slabs of cannabis found – whether two or six slabs.

[26] In this case, just like *Hasbala*'s, there was not a single doubt raised that the cannabis seized from the container and that from the half cigarette were the very same ones handed to the investigating officer by Insp Irwan just a few hours after the raid was conducted, kept in her locked cabinet after that and handed over by her to the chemist about a week later. At the Chemistry Department, the exhibits were given their own reference number, protecting their identities further and obliterating any possibility of a mix-up with other drugs exhibits sent there. The physical exhibits in the form of the eight plastic packets and one aluminium foil which earlier contained the cannabis were tendered as well as the half cigarette butt or what remains of it after the analysis as exhs P12(A)(i) to (viii), P12(F) and P13(C), respectively. The balance of the cannabis after analysis were also tendered as exhs P12(B), P12(D) and P13(B)(i), respectively. There was no break in the chain of the exhibits and these evidences have moved me to make a positive finding on the integrity of the drug exhibits and the credibility of the evidence pertaining to the drug exhibits which were seized, analysed by the chemist and produced in court at the trial.

[27] My final order is that all documentary exhibits are to be kept in the case docket whilst the rest, after the lapse of the appeal period are to be returned to the prosecution and destroyed.

Accused discharged and acquitted of both charges without his defence being called.

Reported by Kohila Nesan